83-1134

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No.

In The

Supreme Court of the United States

October Term 1983

RAYMOND LURCH, PETITIONER

v.

UNITED STATES OF AMERICA,

v.

REGENTS OF THE UNIVERSITY OF NEW MEXICO AND RALPH KAPLAN, M.D.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the independent contractor exclusion of the Federal Tort Claims Act can be held applicable without regard to existent facts concerning day-to-day supervision by the Federal Government of the person or entity alleged to be an independent contractor?

2. Whether the day-to-day supervision of operations by the Federal Government test for determining if a person or entity is an independent contractor for purposes of the Federal Tort Claims Act should be modified as it is applied to the professional activities of physicians?

3. Whether the independent contractor exclusion of the Federal Tort Claims Act is applicable to tortious acts or omissions of a physician in the performance of his duties for the Department of Medicine and Surgery of the Veterans Administration in a Veterans Administration hospital?

PARTIES TO THE PROCEEDING

The parties here listed are all of the parties to this action. The Veterans Administration is the particular agency of the United States involved.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Bruce P. Moore, attorney at law, on behalf of Raymond Lurch petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this cause.

OPINIONS BELOW

The opinion of the court of appeals (App. A, A1-A16, *infra*) is reported at 719 F.2d 333. The decision of the district court (App. C. C1-C4, *infra*) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 12, 1983. (App. B. 1b). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 410(a) of the Federal Tort Claims Act, 60 Stat. 843-4, as enacted into present form at 62 Stat. 933, as amended, codified at 28 U.S.C. Sec. 1346(b) provides:

> Subject to the provisions of chapter 171 of this title, the District Courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accuruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if an private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. Section 402 of the Federal Tort Claims Act, 60 Stat. 842-3, as enacted into present form at 62 Stat. 982-3, codified at 28 U.S.C. Sec. 2671, in relevant part provides:

> As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.
>
> "Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a

federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

3. Section 410(a) of the Federal Tort Claims Act, 60 Stat. 843-4, as enacted into present form at 62 Stat. 933, codified at 28 U.S.C. Sec. 2674, provides in relevant part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

4. Section 6(a) of Pub. L. 89-311, 79 Stat. 1156 being codified as 38 U.S.C. Sec. 4116(a) provides:

> The remedy —
>
> (1) against the United States provided by sections 1346(b) and 2672 of title 28, or
>
> (2) through proceedings for compensation or other benefits from the United States as provided by any other law, where the availability of such benefits precludes a remedy under section 1346(b) or 2672 of title 28,
>
> for damages for personal injury, including death, allegedly arising from malpractice or negligence of a physician, dentist, podiatrist, optometrist, nurse, physician assistant, expanded-function dental auxiliaries, pharmacist, or paramedical (for example, medical and dental technicians, nursing assistants, and therapists) or other supporting personnel in furnishing medical care or treatment while in the exercise of such person's duties in or for the Department of Medicine or Surgery shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, podiatrist, optometrist, nurse, physician assistant, expanded-function dental auxiliaries, phar-

macist, or paramedical or other supporting personnel (or such person's estate) whose act or omission gave rise to such claim.

STATEMENT OF THE CASE

1. The United States, its agencies, officers and employees may not be sued in tort for any act or omission within the scope of duty absent an express waiver of sovereign immunity. The Federal Tort Claims Act is a limited waiver of sovereign immunity. From its inception the Federal Tort Claims Act has contained an independent contractor exception which maintains sovereign immunity relative to the tortious acts or omissions of independent contractors or their employees. 28 U.S.C. Sec. 2671. Whether a person or entity is an employee or agent of the United States or an independent contractor is a question of federal law. *Logue v. United States*, 412 U.S. 521, 528 (1973). This Court is *United States v. Orleans*, 425 U.S. 807 (1976) specifically held that "(a) critical element in distinguishing an agency from a contractor is the power of the Federal Government 'to control the detailed physical performance of the contractor. *Logue v. United States*, 412 U.S. 521, 528 (1973).'" 425 U.S. at 814. From that critical element devolved the test of whether the "day-to-day operations (of the contractor) are supervised by the Federal Government." 425 U.S. at 815. Additionally, 38 U.S.C. Sec. 4116(a) provides that the remedy against the United States for damages for personal injury as a result of a physician's malpractice when performing duties in or for the Department of Medicine and Surgery of the Veterans Administration shall be exclusive.

2. Plaintiff filed suit in the United States District Court for the District of New Mexico against the United States for damages incurred as a result of surgery, negligently performed upon him, while a patient at the Veterans Administration Hospital in Albuquerque, New Mexico on May 20, 1976, jurisdiction being based on 28 U.S.C. Sec. 1346(b). The United States answered and claimed, *inter alia*, that the

surgeon who performed the surgery on Plaintiff was an employee of an independent contractor. The United States, also, filed a third party claim against that surgeon, Ralph Kaplan, M.D., and the medical school, the University of New Mexico School of Medicine, said to employ him. The parties stipulated that the question of the doctor's employment status and related issues would be bifurcated from the remaining issues of malpractice, injury and damages. On October 20, 1980 the District Court found that the doctor was an employee of the University of New Mexico, which was an independent contractor, and on that day judgment was entered dismissing Plaintiff's First Amended Petition. (Apps. C and D, *infra*).

In the District Court Petitioner urged that in those instances in which the employment status of a physician[1] is at issue, it is of no consequence that he is not subject to direct control by others in the performance of his professional skills, that he is free to perform any procedure within his realm of expertise, that the decision to perform any particular procedure is solely between he and his patient, and that he is not subject to control in his selection of methods or equipment to be used. Rather, Petitioner urged that the detailed control test should be focused upon the areas of medical and surgical practice, and activities necessarily incident thereto, that can be supervised and controlled. Petitioner further urged that 38 U.S.C. Sec. 4116(a) vitiated the effect of the independent contractor exception of the Federal Tort Claims Act for the torts of medical personnel occurring within a Veterans Administration hospital.[2] The District Court, nonetheless, found that for all

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[1]The term physician includes those with sufficient postgraduate training to practice whatever specialty, if any, the doctor holds himself out to practice. Thus, interns and residents who are undergoing training and are subject to direct control are excluded.

[2]Petitioner, also, raised an issue of equitable estoppel asserted to foreclose reliance by the United States on the independent contractor exception of the Federal Tort Claims Act; it is not before the Court.

administrative and tax purposes Dr. Kaplan was carried as an employee of the University of New Mexico, that he performed work at the Veterans Administration Hospital pursuant to a contract between the Veterans Administration and the University of New Mexico, and that Dr. Dan Smith, Chief of Surgical Services at the hospital, did not direct or control the details of the provision of medical and surgical services by Dr. Kaplan to Petitioner, such as whether to invoke surgery, the procedure to be used or the instruments or equipment to be utilized. (App. C., *infra*, at C3). The District Court reached Petitioner's contentions regarding 28 U.S.C. Sec. 4116(a) only by implication. (App. C *infra*, at C4).

Upon appeal the Court of Appeals agreed that the details of the provision of medical and surgical services were, and could only be, governed, directed and controlled by the treating physician's exercise of his independent judgment and skills. (App. A., *infra*, at A8). With control of the detailed physical performance of a physician's tasks viewed as resting with the physician, the Court of Appeals held that the existence of the contract between the Veterans Administration and the University of New Mexico, pursuant to which Dr. Kaplan was for all administrative and tax purposes treated as an employee of the University of New Mexico, was of itself sufficient to uphold the decision of the District Court that the independent contractor exception to the Federal Tort Claims Act shielded the United States from liability. (App. A., *infra*, at A8).

The Court of Appeals further held that the explicit reference to 28 U.S.C. Sec. 1346(b) and 2672 in 38 U.S.C. Sec. 4116(a) made the independent contractor exception of the Federal Tort Claims Act. 28 U.S.C. Sec. 2671, applicable to causes of action based upon tortious conduct by medical personnel when performing duties in or for the Department of Medicine and Surgery of the Veterans Administration. (App. A., *infra*, at A12-13). The Court of Appeals further reasoned that the use of the phrases "within the scope of such person's employment" and "that the employee whose act or omission gave rise to suit was not acting within the scope of such per-

son's office or employment," to be found at 28 U.S. Secs. 4116(b) and 4116(d) evince A Congressional intent not to expand the protection of 28 U.S.C. Sec. 4116(a) to other than Federal officers or employees. (App. A., *infra*, at A13).

REASONS FOR GRANTING CERTIORARI

This case presents important questions concerning the application of the "'power of the Federal Government 'to control the detailed physical performance of the contractor'" test for determining whether a party is an officer, employee or agent of the United States or an independent contractor. *United States v. Orleans, supra*, 425 U.S. at 814. These questions arise because "the detailed physical performance of the contractor" and his duties cannot be controlled due to the actor's professional, ethical obligation to exercise his own skill and judgment.[3] This case, also, presents the question of whether the remedy for the medical malpractice of a physician who admittedly is the employee of an independent contractor, occurring within a Veterans Administration hospital during the course of a surgical procedure performed for the Department of Medicine and Surgery of the Veterans Administration is that of the Federal Tort Claims Act, irrespective of the extent of Federal control of the physicians's activities, pursuant to 38 U.S.C. Sec. 4116(a).

1. In *United States v. Orleans, supra*, the Court set forth the critical test for determining whether a person or entity that ordinarily cannot be considered as an employee or agent of the United States nonetheless may be considered as an employee or agent for purposes of the Federal Tort Claims Act. Succinctly stated, the test in terms of the case is whether the Federal Government had the power to control the detailed

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[3]See *Principles of Medical Ethics*, Sec. 6, reprinted in Opinions and Reports of the American Medical Association Judicial Council, 5 (1977). These same principles apply with equal force to all other professions in which the skill and judgment of the practitioners traditionally have not been subject to direct control. See Canon 5, American Bar Association, *Model Code of Professional Responsibility* (1969), as amended.

physical performance of the duties of Dr. Kaplan or whether the Federal Government supervised the "day-to-day operations" of Dr. Kaplan. 425 U.S. at 814, 815. The Court of Appeals recognized that literal application of that test would make it "doubtful whether a physician could ever be found to be a federal employee under the FTCA." It then noted the logical need to either modify the control test or develop a different test regarding physicians. (App. A., at A8). It, however, declined to do either, holding instead that the contract, and its application, between the Veterans Administration and the University of New Mexico was sufficient to support a finding that Dr. Kaplan was not an employee of the Veterans Administration. (App. A., at A8).[4]

The existence of a contract and its application, without regard to facts concerning day-to-day supervision, is directly contrary to the holdings in *United States v. Orleans, supra,* and *Logue v. United States, supra.* There simply are no cases since 1976 out of any Federal court which do not apply the day-to-day supervision test. Even the Tenth Circuit when faced with vocations not having a built-in ethical obligation to exercise independent judgment rigidly gives application to the day-to-day supervision test. *E.g., Flynn v. United States*, 631 F.2d 678 (10th Cir. 1980). Only a few courts have been faced with the necessary tension between the day-to-day supervision test and the medical practitioner's exercise of independent judgment, and they have opted to conform completely to the day-to-day supervision test, notwithstanding the patent inapplicability of the test *Wood v. Standard Products Co.*, 671

[4]The Court of Appeals, also, held that the indicta of control noted by Petitioner amounted to no more than "pervasive regulation of Dr. Kaplan by the V.A. hospital," and was insufficient to avoid the independent contractor exception of the Federal Tort Claims Act. (App. A., at n. 9). That dicta disregarded testimony by Chief of Surgical Services at the hospital that Dr. Kaplan was under his supervision, subject to Dr. Kaplan's duty to exercise his skills and judgment in his specialty. We are inclined to view the Court of Appeals' dicta as a further example of confusion engendered by rigid adherence to the day-to-day control test in this unusual context.

F.2d 825 (4th Cir. 1982; *Walker v. United States*, 549 F. Supp. 973 (W.D. Okla. 1982).[5] Thus, the holding of the Court of Appeals in general and particular applications stands in complete isolation. This Court should undertake to rectify this dangerous precedent, and in that task should state a test that can be applied to physicians.

2. The Court in *United States v. Brown*, 348 US. 110 (1954), faced the question of the viability of a Federal Tort claim premised upon the use of a defective tourniquet during knee surgery at a Veterans Administration hospital. The Court held that the Federal Tort claim was actionable, couching its holding in terms of responsibility of the hospital. In *United States v. Muniz*, 374 U.S. 150 (1963), the Court noted that the Federal Government had "clearly waived" soverign immunity for "negligent treatment in government hospitals." 374 U.S. at 155 n.9. Though the errant physicians in those cases were government employees, the language utilized by the Court in the opinions is no so limited. At approximately the same time as *Brown* and slightly earlier *Muniz* state courts began developing the doctrine of ostensible or apparent agency to hold hospitals liable for the tortious acts of physicians who were not employees but with whom there was a significant hospital-physician relationship. See *Seneris v. Haas*, 45 Cal. 2d 811, 291 P.2d 915, 926-7 (1955). Hospitals operated by the United States and specifically those of the Veterans Administration, differ greatly from the usual hospitals to be found in this country. The class of persons to be served is limited by statute; the degree and extent of medical care offered is set by statute; the patient has no contract with the treating physician and very few physicians who might qualify

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[5]We must note that similar issues arise under the Social Security Act and the Internal Revenue Code. Under those acts, the courts hav e held that the determinaton of whether one is an independent contractor cannot be based on factors which are controlled only by a practitioner's ethical obligation to exercise independent judgment. *Azad v. United States*, 388 F.2d 74, 77 (8th Cir. 1968); *Cody v. Ribicoff*, 289 F.2d 394, 398 (8th Cir. 1961); *Flemming v. Haycke*, 284 F.2d 546, 550 (9th Cir. 1960).

are permitted to practice in such hospitals, and if they do practice, it is not for the benefit of their private patients.[6] With these factors considered the language in *Muniz* quoted above is explicable. The opinion of the Court of Appeals effectively reinstitutes a distinction between two classes of physicians at government hospitals — those overtly employed and those not — which can be ascertained only by those in the administrative or personnel departments of the hospitals, but certainly not by the patients effected.

3. With the rather large number of medical malpractice actions brought against the United States as a result of treatment in Veterans Administration hospitals, 38 U.S.C. Sec. 4116(a) appears somewhat ignored. By its terms this section is applicable to provision of medical care by a physician in the exercise of the physician's duties in and for the Department of Medicine and Surgery. Because 38 U.S.C. Sec. 4116(a) is clear and unambiguous on its face, the Court of Appeals should not have resorted to statutory interpretation. *E.g., Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).[7] But if reference to legislative intent be necessary, the legislative history of 38 U.S.C. Sec. 4116(a) leaves no doubt that Congress intended to extend Federal Tort Claims Act responsibility to all medical personnel performing duties in or for the Veterans Administration. Conf. Rpt. No. 1201, 89th Cong., 1st Sess. (1965). We, also, think if clear that Congress was

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[6]The relationship between the usual hospital and its staff physicians is explored in *Alden v. Providence Hospital*, 127 U.S.App.D.C. 214, 382 F.2d 163 (1967), per Burger J. concurring in part and dissenting in part.

[7]The Court of Appeals' interpretation that the reference to 28 U.S.C. Secs. 1346(b) and 2672 in 38 U.S.C. Sec. 4116(a) incorporates the independent contractor exclusion ignores the fact that the reference refers to the remedy and nothing more. The conclusions reached by the use of phrases related to employment in 38 U.S.C. Secs. 4116(b) and 4116(c) misses the point that those subsections have applicability to certain limited factual situations and do nothing to give meaning to the terms "employee" or "employment," nor do they limit governmental responsibility for medical malpractice occurring in Veterans Administration hospitals.

aware of developments in the field of hospital malpractice and liability, at least as expressed by this Court. See Subpart 2, *supra.*

Regardless of Petitioner's view of the pertinence of 38 U.S.C. Sec. 4116(a), the sheer size of the Veterans Administration medical and hospital services, with the inevitable occasional medical malpractice and the proportionately large volume of Federal Tort Claims Act actions brought to redress such grievances. (see subpart 4 hereof, *infra*), whether real or imagined, requires explication of the relationship of 38 U.S.C. Sec. 4116 to the principal body of the Federal Tort Claims Act.

4. The "complete medical and hospital service" of the Veterans Administration mandated by 38 U.S.C. Sec. 4101(a) is a mammoth undertaking. In fiscal 1982 well in excess of $6,000,000,000 was spent on the care and treatment of 1,272,151 patients. A total of 340,842 surgical procedures were performed in 136 of the Veterans Administration's 172 medical centers. Those surgical procedures were performed by 778 full time surgeons, 1,537 part-time surgeons, and 2,567 residents. Veterans Administration, Administrator of Veterans Affairs, *Annual Report 1982*, 13, 21(1982). Though the Veterans Administration ceased reporting information on claims in its Annual Reports after 1980, we note that in fiscal 1978 there were 450 claims for patient compensation, in fiscal 1979 there were 532 such claims, and in fiscal 1980 there were 643 such claims. During this period the number of claims per 100 physicians rose from 2.54 in fiscal 1978, to 3.12 in fiscal 1979, and to 3.49 in fiscal 1980. Veteran's Administration, Administrator of Veterans Affairs, *Annual Report 1979*, 34 (1979); Veterans Administration, Ad ministrator of Veterans Affairs, *Annual Report 1980*, 41 (1980). There is no reason to suppose that this trend has abated. These figures are of interest because within the class of part-time surgeons are to be found those surgeons who are operating in Veterans Administration hospitals pursuant to contracts entered into under authority of 38 U.S.C. Sec.

4117, such as Dr. Kaplan.[8] It is patently obvious that, if the opinion of the Court of Appeals is allowed to stand, an increasing proportion of the medical and surgical care at Veterans Administration medical centers will be performed by physicians action under contracts for the provision of medical or surgical services.

This situation would likely have a number of results that are not consistent with the general statutory scheme governing the Veterans Administration, the most important of these being that varying degrees of control over the provision of medical and surgical services at Veterans Administration facilities would be exercised by parties other than the Veterans Administration. While the Veterans Administration is engaged in certain risk management strategies (see *Annual Report 1979, supra*, at 34-5), insurance carriers insuring physicians and hospitals may have their owns different risk management techniques. Those techniques can infringe upon control of the degree and types of care to be provided. See generally B. Brown, *Risk Management For Hospitals* (1979). We, also, note that the opinion of the Court of Appeals will necessitate recourse to state law for redress of injuries occurring in Veterans Administration hospitals. As a general matter that may be a desirable; however, it will mean that state courts and administrative bodies will indirectly influence the types and quality of care that will be provided at Veterans Administration medical centers. For instance in New Mexico all claims against qualified health providers[9] must initially be submitted to the New Mexico Medical Review Commission, which reviews the claim, holds a hearing and issues a decision. Thereafer, the claim may be injected into the state's judicial system. See Sec. 41-5-14 et seq. N.M.S.A. 1978. As a matter of necessity that will entail review of a procedure occurring

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[8]Though our discussion emphasizes surgeons, it is equally pertinent to non-surgical specialties.

[9]The term is defined at Sec. 41-5-3(A) and Sec. 41-5-5 N.M.S.A. 1978, but it basically includes health care providers who carry at least $100,000 professional liability coverage.

within and for the Veteran's Administration by no less than four attorneys and three physicians who have no relationship with the Veteran's Administration. Secs. 41-5-14 and 17 N.M.S.A. 1978. We decline to speculate on the additional number that may be involved if the case goes to court. We think it inconceivable that this magnitude of review would not have a dramatic impact on the quality and type of care provided in Veterans Administration facilities, all of which would be completely beyond the control of the Federal government. We note, also, that because of the Privacy Act physicians denfending themselves before state tribunals may have difficulty obtaining release of the pertinent medical records from the Veterans Administration.[10] Finally, the Federal Tort Claims Act provides that claims filed in court will be tried before the court without a jury and attorneys representing plaintiffs may obtain no more than 25% of any award as fees. In the New Mexico courts jury trials are available upon request (N.M. Const. art. II, sec. 12), and the usual contingency contract calls for the attorney to receive 33 1/3% of any award, though in medical malpractice cases contingency fee contracts for the attorney to receive 40% of the award are far from unusual We think it clear that these factors fly in the face of the Federal statutory scheme for the disposition of medical malpractice claims premised on events in Veterans Administration medical facilities.

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[10]Petitioner was forced to file an action in District Court to obtain the release of his own medical records from the Veterans Administration. *Lurch v. Veterans Administration*, D.N.M. No. CIV 77-129 M.

CONCLUSION

For the foregoing reasons, the opinion of the Court of Appeals effectively eliminates the day-to-day supervision of the contractor test applicable to the application of the independent contractor exception of the Federal Tort Claims Act whenever the performance of a professional task is at issue, and it misconstrues legislation intended by Congress to avoid the issue here presented. Therefore, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

RAYMOND LURCH, *Plaintiff-Appellant,*	)	
v.	)	No. 80-2226
UNITED STATES OF AMERICA, *Defendant-Third Party Plaintiff-Appelle,*	)	
V.	)	*FILED*
THE REGENTS OF THE UNIVERSITY OF NEW MEXICO and RALPH KAPLAN, *Third Party Defendants.*	)	*United States Court of Appeals/Tenth Circuit Oct. 12, 1983 Howard K. Phillips, Clerk*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO (D. C. No. CIVIL-79-034C)

Bruce P. Moore, Moscow, Idaho (Paul S. Cronin, Duhigg & Dronin, Albuquerque, New Mexico, were also on the brief for Plaintiff-Appellant)

L. D. Harris, Assistant United States Attorney (R. E. Thompson, United States Attorney, Albuquerque, New Mexico, was also on the brief) for Defendant-Appellee.

Before HOLLOWAY, BREITENSTEIN, and LOGAN, Circuit Judges

HOLLOWAY, Circuit Judge

This is a suit under the Federal Tort Claims Act claiming that negligence by a neurosurgeon in the employ of the Government at a Veteran's Administration Hospital, while attempting surgical relief for severe facial pain, produced total loss of plaintiff Lurch's hearing in his left ear with a return of the pain symptoms sought to be relieved.

The central issue is whether the physician who treated the plaintiff was an employee of the Government for purposes of the FTCA. The district court held that the physician was not a federal employee because he performed neurological services for the Veteran's Administration Hospital pursuant to a contract between the Veteran's Administration and the University of New Mexico School of Medicine. I R. 212. The court dismissed the complaint against the Government and also dismissed as moot the Government's third part complaint against the Regents and Dr. Kaplan. Plaintiff appeals.

I

On September 17, 1975 the plaintiff, Raymond Lurch, visited the Veterans' Administration Hospital in Albuquerque, New Mexico, because he was suffering from severe pain on the left side of his face. Dr. Kaplan examined him there and diagnosed a secondary trigeminal neuralgia.[1] III R. 8. The plaintiff visited Dr. Kaplan on two subsequent occasions, and they discussed the possibility of surgery.

On May 19, 1976 plaintiff was admitted to the V.A. Hospital with "terrible facial pain." An informed consent form was signed that day, and the following day Dr. Kaplan performed surgery. The operation was designed to sever the branches of the fifth cranial nerve that provide facial sensation.[2] After surgery, the pain returned and plaintiff eventually lost all hearing in his left ear. Plaintiff alleged that this was caused by negligent injury to his eighth cranial nerve during the operation.

On March 4, 1977 plaintiff sued the Veteran's Administration under the Freedom of Information Act (FOIA) to obtain all medical and administrative records concerning his care and treatment. The Veteran's Administration subsequently settled this suit by relinquishing all administrative records to plaintiff. I R. 68.

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[1]This pain was secondary to the trauma caused by an earlier accident with the fan belt of a car in which plaintiff lost his left eye. III R. 5-8. Trigeminal neuralgia is defined as excrutiating episodic pain in the area supplied by the trigeminal nerve, (i.e., the fifth cranial nerve). It is often precipitated by stimulation to well defined trigger points. *Dorland's Illustrated Medical Dictionary* 1038 (25th ed. 1974). At times talking, eating, or brushing the teeth can serve as a trigger. 1 *Textbook of Medicine* 612 (ed. P. Beeson & W. McDermott, 14th ed. 1975).

[2]The procedure is called a posterior fozza rhizotomy. III R. 18.

In October 1977 plaintiff filed an administrative claim for damages. The claim was not acted on by the Government and hence was deemed denied.[3] In January 1979 the plaintiff brought suit against the United States under the FTCA. I R. 1. After filing an answer to plaintiff's first amended complaint, the United States joined the Regents of the University of New Mexico and Dr. Kaplan as third party defendants. The United States moved for summary judgment against the plaintiff, arguing that Dr. Kaplan was not a Government employee but the employee of an independent contractor, thereby insulating the United States from liability under the FTCA. *See* 28 U.S.C. §1346(b) (United States liable for negligence of its employees); *id.* §2671 (independent contractors are not employees). This motion was denied.

Thereafter the parties stipulated that the district court could decide without an evidentiary hearing whether Dr. Kaplan was an employee of the Government. The issue was submitted on the contract, depositions and affidavits. The court held that Dr. Kaplan was not a federal employee. Rather, he was the employee of the University of New Mexico, an independent contractor, and the United States could not be liable. The court also determined that the third party complaint of the Government was therefore moot and should be dismissed.

The basis of the district court's decision was that the V.A. Hospital did not direct or control Dr. Kaplan's medical treatment of the plaintiff. Additionally, the court found that the contract between the V.A. and the University of New Mexico provided that persons rendering services to the V.A. under the

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[3]Bringing an administrative claim is a prerequisite before suit can be brought in United States District Court under the FTCA. 28 U.S.C. §2675. The administrative claim must be denied by the agency either in writing or by failure to make a final disposition within six months of filing before a claimant can sue. This requirement is jurisdictional and cannot be waived. *Three-M Enterprises v. United States*, 548 F.2d 293 (10th Cir. 1977). There may have been a three-months extension of the period for administrative action on this claim. *See infra*, note 13.

contract "were not to be considered Veterans' Administration employees for any purpose." I R. 212.[4] Under the contract the University assumed full responsibility for protection of employees in furnishing services, such as providing for insurance and Social Security Payments, and since late 1975 the University of New Mexico paid Dr. Kaplan for work he did at the V.A. Hospital. I R. 212.

In addition, the district court found that the medical services could be provided by one or more neurosurgeons at the discretion of the School of Medicine of the University. After November 20, 1975, Dr. Kaplan received his compensation or pay check from the University and he did not receive any payment from the Veterans Administration Medical Center for services performed in May, June or July, 1976. I R. 212. The court further found that the Chief of the Surgical Service of the V.A. Medical Center did not influence the practice of the neurosurgeons from the University who were providing services to the V.A. Medical Center and the surgeons were free to perform any surgery at the Center considered within the realm of neurological surgery. The Chief of Surgery of the V.A. Medical Center did not direct or control Dr. Kaplan in performing the surgery on plaintiff and could not and did not direct Dr. Kaplan as to the surgical methods or instruments to be used in any surgery. I R. 213.

Of the findings, which we have outlined above, plaintiff challenges only two — findings 14 and 17 — as not being supported by the record. Appellant's Brief in Chief at 6. Those were findings respectively as follows:

> 14. The services could be provided by one or more neurosurgeons at the discretion of the School of Medicine, University of New Mexico.
>
> * * *
>
> 17. The Chief of the Surgical Service, Veterans Administration Medical Center, did not influence the practice

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[4]This contract was entered into under the authority of 38 U.S.C. §4117.

> of the neurosurgeons from the University of New Mexico who were providing services to the Veterans Administration Medical Center and said surgeons were free to perform any surgery at the Veterans Administration Medical Center that was considered within the realm of neurological surgery.

I R. 212-13.

Essentially the plaintiff argues that the district court erroneously concluded that Dr. Kaplan was not an employee of the United States. It is plaintiff's position that the control test as generally applied is not the appropriate test for determining if a physician is a federal employee. Should we reject this, plaintiff has two alternative arguments. He further contends: (1) that 38 U.S.C. §4116(a) creates an exception for physicians to the statutory rule that the United States is not liable for the negligence of independent contractors; and (2) that the United States should be equitably estopped from asserting the independent contractor defense. We are not persuaded by plaintiff's arguments and accordingly affirm.

II

The independent contractor exception

Under the FTCA, the United States is liable for the "negligent or wrongful act or omission *of any employee of the Government* while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C §1346(b). (emphasis added). The United States is not liable for acts of independent contractors. *Id.* §§ 1346, 2671. *See United States v. Orleans*, 425 U.S. 807, 813-14 (1976). This same rule applies to the employees of independent contractors. *Hill v. Schweiker*, 532 F.Supp. 1014 (D.N.H. 1982). Thus it is important to distinguish between federal employees and the employees of independent contractors. And it is well settled that the question whether one is an

employee of the United States is to be determined by federal law. *See Logue v. United States*, 412 U.S. 521, 528 (1972); *Brooks v. A. R. & S. Enterprises Inc.*, 622 F.2d 8, 10 (1st Cir. 1980); *Lefevere v. United States*, 362 F.2d 352, 353 (5th Cir. 1966); *Pattno v. United States*, 311 F.2d 604, 605 (10th Cir. 1962), *cert. denied*, 373 U.S. 911 (1963).

The Supreme Court has made clear that a critical element in distinguishing a Government agency from an independent contractor is the power of the Federal Government "to control the detailed physical performance of the contractor." *United States v. Orleans, supra*, 425 U.S. at 814; *Logue v. United States, supra*, 412 U.S. at 527-28. The key inquiry under this control test is whether the Government supervises the day-to-day operations of the individual. *United States v. Orleans, supra*, 425 U.S. at 815. The district court found that the V.A. Hospital did not and could not control the manner in which Dr. Kaplan rendered medical treatment to the plaintiff, I R. 213. The decision to operate and the selection of surgical procedures and instruments were made by Dr. Kaplan without the control or influence of the V.A. Hospital. Plaintiff does not challenge these findings.[5] Under these precedents it would seem that the requisite control, as a premise for finding that Dr. Kaplan is a federal employee, is lacking.

Plaintiff attempts to distinguish these cases by arguing that the control test should be subject to special considerations when a physician's employment status is at issue. Plaintiff reasons that because a physician must be free to exercise his professional judgment when he renders medical services, the control test as it has been generally applied is inappropriate to determine a physician's employment status. Plaintiff argues instead that those areas of medical service that *are* susceptible to supervision and control should be considered in determining if a physician is a federal employee.

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[5]Plaintiff accepts all the findings except findings 14 and 17. Appellant's Brief in Chief at 6. In findings 18 through 20, the district court found that it was Dr. Kaplan's decision to operate and he made the choice of surgical procedures and instruments. I R. 213.

We grant the logic and appeal of plaintiff's argument. A physician's professional ethics require that he have "free and complete exercise of his medical judgment and skill . . . . " Principles of Medical Ethics § 6, *reprinted in* Opinions and Reports of the American Medical Association Judicial Council, 5 (1977). Because a physician must exercise his own professional judgment, no one controls the detailed physical performance of his duties. Given this, by strictly following the traditional control test it is doubtful whether a physician could ever be found to be a federal employee under the FTCA.[6] Yet such a result would not comport with Congressional intent.[7] Hence it seems logical that some modified control test or some different test should apply with respect to physicians.

Today, however, we need not reach this question because we conclude that on the undisputed facts here, the contractual arrangement itself and its application placed Dr. Kaplan outside the parameters of an employer-employee relationship with the Government. *See Logue v. United States, supra*, 412 U.S. at 530. The V.A. Hospital did not have a traditional employer-employee relationship with Dr. Kaplan. The V.A. had a contract with the University of New Mexico School of Medicine under which the University had the discretion to choose which physician or physicians would fulfill the University's obligations. I R. 44. This is not consonant with a traditional employer-employee relationship. Furthermore the contract expressly stipulated that "[s]uch [medical] personnel shall not be considered V A employees for any purpose." I R.

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[6]By the application of traditional control test standards, physicians have been held not to be employees of the Government in *Wood v. Standard Products Co.*, 671 F.2d 825 (4th Cir. 1982), and *Walker v. United States*, 549 F.Supp. 973 (W.D.Okla. 1982).

[7]Section 4116 unambiguously contemplates that the United States can be liable for the malpractice of physicians. 38 U.S.C. §4116(a) (United States can be exclusive defendant in malpractice action). *See e.g., Wright v. Doe*, 347 F.Supp. 833 (M.D. Fla.). The United States has been held liable under the FTCA for physician malpractice. *See, e.g., Earnest v. United States*, 81-1691 & 81-1840 (10th Cir. Apr. 11, 1983) (per curiam).

45. Additionally the University assumed full responsibility for the protection of its personnel furnishing services under the contract, in accordance with the personnel policy of the University, such as providing workmen's compensation, insurance, health examinations and social security payments. *Id.* at 45.[8]

Thus, the areas of general supervision of Dr. Kaplan's activity, which plaintiff seems to say should be considered, were confided to the University of New Mexico School of Medicine under the contract arrangement between the V.A. and the University. Because of that contract, which was not a sham, and the working arrangement under it between the V.A. and the University, we conclude that we must hold the independent contractor exemption from FTCA liability applies. We do so without reaching the troublesome point whether control of the minutiae of medical decisions and procedures should not be considered because they are always reserved to the individual physician.[9]

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[8]The court found that services performed by Dr. Kaplan at the Veterans Administration Medical Center in May 1976 were performed with the understanding that the contract expiring March 1, 1976 would be extended until June 2, 1976. I R. 212.

[9]As an alternative argument, plaintiff appears to say that even under the traditional control test, there was sufficient control of the details of Dr. Kaplan's work so that he was an employee of the Government. Plaintiff argues, *inter alia*, that Dr. Kaplan could not refuse to see a V.A. patient requiring neurological care; that Dr. Kaplan or another neurosurgeon was required to be present at all V.A. neurological clinics; that Dr. Kaplan could be terminated by the hospital; and that he had to conform to V.A. rules and regulations.

Even if we accept all these assertions as being correct, they are insufficient to demonstrate that Dr. Kaplan was a federal employee because taken together they amount to no more than pervasive regulation of Dr. Kaplan by the V.A. hospital. General regulation of activities was held not to avoid the independent contractor exemption from FTCA liability in *United States v. Orleans*, 425 U.S. 807, 817-18 (1975), and *Logue v. United States*, 412 U.S. 521, 529-30 (1973). *See also United States v. Page*, 350 F.2d 28 (10th Cir.), *cert. denied*, 382 U.S. 979 (1965); *Norton v. Murphy*, 661 F.2d 882 (10th Cir. 1981); *Flynn v. United States*, 631 F.2d 678 (10th Cir. 1980); *Craghead v. United States*, 423 F.2d 664 (10th Cir. 1970); *Eutsler v. United States*, 376 F.2d 634 (10th Cir. 1967).

The broad independent contractor exemption is itself controlling in this case. As the Supreme Court pointed out in *Logue v. United States, supra*, 412 U.S. 521, Congress did not leave the independent contractor exemption subject to the vagaries of state law departures from the exemption and the courts are not "free to abrogate the exemption that the Act provides." *Id.* at 528. We are persuaded that here the contract between the V.A. and the University controls, as in *Logue. Id.* at 530. The supervision and general control of the physicians resided with the University under the contractual arrangement. The findings were not clearly erroneous and the ruling that Dr. Kaplan was not a Government employee must be upheld.

III

Plaintiff's alternative arguments

A. **The pre-trial order**

We first address a contention by the Government that because the pre-trial order makes no specific reference to plaintiff's alternative arguments, they are not properly before this court. I R. 119-25. Plaintiff says that the pre-trial order implicitly preserves its arguments concerning 38 U.S.C. § 4116(a) and estoppel.

We recognize that the purpose of a pre-trial order is to narrow the issues and thereby streamline litigation, and prevent surprise. *Cleverock Energy Corp. v. Trepel*, 609 F.2d 1358, 1362 (10th Cir. 1979), *cert. denied*, 446 U.S. 909 (1980). To fulfill this purpose, a pre-trial order that sufficiently defines the issues will generally control the lawsuit both at trial and on appeal. *Hodgson v. Humphries*, 454 F.2d 1279, 1281 (10th Cir. 1972). *See Century Refining Company v. Hall*, 316 F.2d 15 (10th Cir. 1963). However pre-trial orders have been construed to include issues not specifically mentioned in the order. *E.g., Trujillo v. Uniroyal Corp.*, 608 F.2d 815 (10th Cir. 1979) ("the rule of strict liability" included all three

defects developed in the comments to the Restatement of Torts); *Interstate Plywood Sales Co. v Interstate Container Corp.*, 331 F.2d 449 (9th Cir. 1964) (whether the contract was "valid and enforceable" sufficient to present the issue of price uncertainty because the contract could not be valid and enforceable if the price term were missing). *Accord, Godfrey v. Duckett*, No. 82-1220 (10th Cir. Aug. 23, 1983).

We believe that the plaintiff's two alternative arguments are implicitly within the pre-trial order. Plaintiff first raised these issues in February 1980 in response to the Government's motion for summary judgment. I R. 112-15. The pre-trial order was entered ten days later. *Id.* at 119. The order specifically contemplated that one of the contested issues of law was whether summary judgment should be granted. The district court did not deny the Government's motion until September 1980. *Id.* at 136. Thus, at the time the pre-trial order was entered, the court had before it plaintiff's two alternative arguments. To rule on the motion, the district court needed to consider plaintiff's two alternative arguments made in response. Given these circumstances, we hold that the pre-trial order did not bar the assertion of these alternative issues but implicitly preserved them.

B. 38 U.S.C. §4116(a)

Plaintiff argues that 38 U.S.C. §4116(a) creates an exception for physicians to the rule that the United States is not liable under the FTCA for the negligence of its independent contractors; he says that in the circumstances of this case the independent contractor exemption of 28 U.S.C. § 2671 to Government liability under the FTCA is inapplicable. Appellant's Brief in Chief at 16-19. Section 4116(a) provides:

(a) The remedy —

(1) against the United States provided by sections 1346(b) and 2672 of title 28,

* * *

for damages for personal injury, including death, allegedly

> arising from malpractice or negligence of a physician, . . . or other supporting personnel in furnishing medical care or treatment while in the exercise of such person's duties in or for the Department of Medicine and Surgery shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, . . . or other supporting personnel (or such person's estate) whose act or omission gave rise to such claim.

The gist of plaintiff's argument is that even if Dr. Kaplan was an employee of the University and not the V.A., the Government is subject to liability; that the immunization of individuals from liability by § 4116(a) is not specifically restricted to employees of the federal government; that because analogous statutes have explicitly limited their protection to federal employees,[10] § 4116(a) immunizes independent contractors and their employees; that this therefore is recognition that there *is* FTCA liability for physicians' actions even if they are performing their duties in an independent contractor status, citing also the 38 U.S.C. § 4101(a) provision for the V.A. to provide complete medical and hospital service.

We reject the argument for two reasons. First, we do not read the statute to increase or expand the available remedies against the United States. It provides that "[t]he *remedy* against the United States provided by sections 1346(b) and 2672 . . . for damages for personal injury, including death,

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[10]Plaintiff relies upon 42 U.S.C. §233(a), which makes the United States the exclusive defendant for injuries that employees of the Public Health Service cause while acting within the scope of their employment. The legislative history of 38 U.S.C. §4116 demonstrates that it was patterned after 28 U.S.C. §2679, which makes the United States the exclusive defendant for injuries in motor vehicle accident caused by federal employees acting within the scope of their employment. Letter from Senator Ralph W. Yarborough to Senator Harry F. Byrd, (Chairman Committee on Finance) (October 8, 1965), *reprinted in* 1965-2 *U.S. Code Cong. & Ad. News*, 3927-29. Both sections limit their protection to federal employees.

alleged arising from malpractice or negligence of a physician . . . shall hereafter be exclusive" 38 U.S.C. §4116(a) (emphasis added). This does not create a cause of action where none existed. This section contemplates that if a remedy exists against the United States, it is the exclusive remedy (*i.e.*., the physician is not personally liable). *See Johnson v. United States*, 547 F.2d 688, 693 n.33 (D.C. Cir. 1976); *Benitez v. Presbyterian Hospital*, 539 F.Supp. 470 (D.P.R. 1982). A threshold requirement before the statute becomes operative is the existence of a remedy against the United States under 28 U.S.C. §§1346(b) and 2672. Since we hold that Dr. Kaplan was not a Government employee, there is no remedy provided against the United States and § 4116(a) does not come into play.

Second, although § 4116(a) does not explicitly limit its immunization to federal employees, the rest of § 4116's scheme is strong evidence that Congress intended that § 4116 apply only to federal employees. Section 4116(b) provides that the "Attorney General shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) of this Section . . . " 28 U.S.C. §4116(b). Section 4116(c) provides that any such civil action shall be removed from state court upon certification "by the Attorney General that the defendant was acting within the scope of such person's *employment*." *Id.* §4116(c) (emphasis added). The case must be remanded to state court if before trial on the merits the district court finds "that *the employee* whose act or omission gave rise to suit was not acting within the *scope of such person's office or employment.*" *Id.* §4116(c) (emphasis added). These statutory provisions evince a Congressional intent that the protection of § 4116(a) extends only to federal employees acting within the scope of their employment.

In sum, we cannot agree that §4116(a) and the other statutes relied on alternatively furnish a basis for Government liability for Dr. Kaplan's acts.

C. Equitable estoppel

Plaintiff reasons that the United States should be equitably estopped to assert that Dr. Kaplan was not a Government employee because he had no notice that Dr. Kaplan might be an independent contractor until after the time for filing a state court action had run. Plaintiff asserts that the Government admitted that Dr. Kaplan was a federal employee in its answer to plaintiff's Freedom of Information Act (FOIA) action[11] and that this, coupled with the V.A. Hospital's failure to have observable differences between physicians employed by the V.A. and employees of independent contractors is enough to estop the Government. It appears to be plaintiff's position that the Government should not have admitted Dr. Kaplan's employment status and that it then had an affirmative obligation to advise plaintiff earlier that Dr. Kaplan might not be a federal employee so that plaintiff could have preserved his state law claim against Dr. Kaplan.

The district court summarily found that "[t]here is no factual basis to equitably estop the United States of America from asserting that Dr. Kaplan was an employee of an independent contractor and not an employee of a federal agency." I R. 214. There are no further findings on this issue.

We are not persuaded by the estoppel argument. The facts are short of what must be proven for estoppel to apply. There is no showing of "affirmative misconduct" by the Government. *See INS v. Miranda*, _____ U.S. _____, 51 U.S.L.W. 3358 (1982).[12] In dealing with a

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[11]Plaintiff brought this FOIA action to obtain the Veterans Administration Hospital's complete medical and administrative records regarding his treatment. These records were allegedly denied plaintiff after a formal request for their surrender. I R. 68.

[12]There are special considerations when a party tries to estop the Government. *See generally*, Note, *Equitable Estoppel of the Government*, 79 Colum. L. Rev. 551, 552-54, 565-68 (1979). The Supreme Court has indicated that a showing of "affirmative misconduct" is necessary to estop the Government. *See INS v. Miranda*, 51 U.S.L.W. 3358 (U.S. 1982) (per curiam); *Schweiker v. Hansen*, 450 U.S. 785 (1981) (per curiam); *INS v. Hibi*, 414 U.S. 5 (1973) (per curiam).

claim of estoppel against the Government this court has recently set out these requirements for such an estoppel. They are: (1) the party to be estopped must know the facts; (2) he must intend that his conduct will be acted upon or must so act that the party asserting the estoppel has the right to believe that it was so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury. *Home Savings & Loan Ass'n v. Nimmo*, 695 F.2d 1251, 1254 (10th Cir. 1982).

In the instant case we find no showing of "affirmative misconduct" by the Government and particularly no showing of the basic second element of estoppel. Plaintiff has not shown that the Government acted in such a way that he had a right to believe that Dr. Kaplan was an employee of the United States for FTCA purposes. In plaintiff's FOIA action, which is relied on, the status of Dr. Kaplan under the FTCA was not at issue. In the FOIA suit the Government merely admitted plaintiff's general allegation that "surgery was performed by certain physicians employed by and on the staff of the Veteran's Administration Hospital in Albuquerque, New Mexico." I R. 71, 81. We cannot agree that evidence of the admission and other circumstances amounted to a showing of conduct which the Government intended the plaintiff to rely on in his tort litigation.

Furthermore, this is not a case where the Government delayed unreasonably in raising the independent contractor defense. Plaintiff first filed his FTCA complaint on January 10, 1979. I R. 1. There is no proof that this was ever served. I Supp. R. 3. Plaintiff filed his first amended complaint on June 12, 1979, I R. 3, and the Government answered on August 28, 1979. *Id.* at 7. Plaintiff asserts that this was the first time he had notice that Dr. Kaplan might not be a federal employee and that at this time the state statute of limitations had already run. Appellant's Brief in Chief at 24-25. Even if true, this is through no fault of the Government. The Government did not delay unreasonably in answering. If the plaintiff had brought

suit earlier,[13] he would have known of the Government's independent contractor defense in time to bring a state action.

Rejection of plaintiff's estoppel contentions is not inconsistent with *Home Savings & Loan Ass'n v. Nimmo, supra*. In *Home Savings* we held that the United States was estopped from denying the validity of a loan transaction. Although the Government had notice that a note and mortgage could have been forged, it paid a loan guaranty without disclosing to Home Savings the possibility of the forgery. Had it known of the risk, Home Savings contended that it could have protected itself by retaining and selling the property. The Government asserted the forgery and claimed the right to reimbursement from Home Savings only after the transaction had closed. We are not faced with such inequitable conduct here.

IV

In sum, we must sustain the district court's ruling that the independent contractor defense is good and that plaintiff's alternative theories of liability are without merit.

AFFIRMED.

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[13]Plaintiff filed his administrative claim on October 4, 1977. I R. 44. After six months if the claim is not settled a claimant has the option of deeming it a final disposition, 28 U.S.C. §2675(a). Although there is some indication in the record that the Government may have been granted a three month extension, I R. 100, even if true plaintiff could have brought suit in about July 1978. New Mexico has a three year statute of limitations for claims arising out of malpractice. N. M. Stat. Ann. § 41-5-13 (1978). Because plaintiff's operation occurred in May 1976, at the earliest his state action was barred in May 1979.

APPENDIX B
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SEPTEMBER TERM — October 12, 1983

Before Honorable William J. Holloway, Jr., Honorable Jean S. Breitenstein and Honorable James K. Logan, Circuit Judges.

RAYMOND LURCH,	)	
	)	
Plaintiff-Appellant,	)	JUDGMENT
	)	
vs.	)	No. 80-2226
	)	
UNITED STATES OF AMERICA,	)	(D.C. No. 79-034-C)
	)	
Defendant-Third Party Plaintiff Appellee,	)	
	)	
vs.	)	
THE REGENTS OF THE UNIVERSITY OF NEW MEXICO and RALPH KAPLAN,	)	
	)	
Third Party Defendants.	)	

This cause came on to be heard on the record on appeal from the United States District Court for the District of New Mexico, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

HOWARD K. PHILLIPS, CLERK

/s/ Robert L. Hoecker,
Chief Deputy Clerk

APPENDIX C
IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

RAYMOND LURCH,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant-Third Party Plaintiff,

vs.

THE REGENTS OF THE UNIVERSITY OF NEW MEXICO and RALPH KAPLAN,
Third Party Defendants.

No. CIV-79-034 C

FILED
United States District Court
Santa Fe, New Mexico
Oct. 20, 1980
Jesse Casaus, Clerk

COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following shall constitute the Findings of Fact and Conclusions of Law of the Court.

FINDINGS OF FACT

1. At the time this action was filed, Plaintiff was a resident of the State of New Mexico.

2. Defendant is the United States of America.

3. Plaintiff seeks damages from Defendant under the Federal Tort Claims Act for an alleged medical malpractice which occurred in May 1976, at the Veterans Administration Medical Center in Albuquerque, New Mexico.

4. On May 20, 1976, a surgical procedure was performed on Plaintiff by Dr. Ralph J. Kaplan.

5. The surgical procedure was performed at the Veterans Administration Medical Center, Albuquerque, New Mexico.

6. At the time the surgical procedure was performed, Dr. Kaplan was a member of the faculty of the School of Medicine, University of New Mexico.

7. At the time the surgical procedure was performed, Dr. Kaplan was an employee of the University of New Mexico.

8. Dr. Kaplan specialized in neurosurgery.

9. The Veterans Administration Medical Center and the School of Medicine, University of New Mexico, had entered into a contract for the School of Medicine, University of New Mexico, to provide specified services to the Veterans Administration Medical Center, Albuquerque, New Mexico. This was done under the authority of 38 U.S.C. Section 4117.

10. The contract which is identified as Contract No. V501P-831 was accepted and approved by the Veterans Administration on May 6, 1976. Appendix B covering the neurological services to be provided was not in existence on the date of acceptance and approval of the contract, but was approved on June 2, 1976, and became a part of said contract after negotiations by Dr. Kaplan, acting on behalf of the School of Medicine, University of New Mexico, with the Veterans Administration to increase the payment for the neurosurgical services furnished by the School of Medicine, University of New Mexico.

11. The contract between the Veterans Administration Medical Center and the School of Medicine, University of New Mexico, stated that the contractor would assume full responsibility for the protection of its personnel furnishing services under the contract, such as providing for workmen's compensation, insurance, health examination and social security payment. Personnel rendering services were not to be considered Veterans Administration employees for any purpose.

12. Contract V501P-831 was a renegotiation and renewal of a similar contract which was to expire on March 31, 1976.

13. The services performed by Dr. Kaplan at the Veterans Administration Medical Center in May 1976, were performed with the understanding that the contract expiring March 31, 1976, would be extended until June 2, 1976.

14. The services could be provided by one or more neurosurgeons at the discretion of the School of Medicine,

University of New Mexico.

15. After November 20, 1975, Dr. Kaplan received his compensation or paycheck from the University of New Mexico.

16. Dr. Kaplan did not receive any payment from the Veterans Administration Medical Center for services performed in May, June or July 1976.

17. The Chief of the Surgical Service, Veterans Administration Medical Center, did not influence the practice of the neurosurgeons from the University of New Mexico who were providing services to the Veterans Administration Medical Center and said surgeons were free to perform any surgery at the Veterans Administration Medical Center that was considered within the realm of neurological surgery.

18. The decision to operate or not was the decision of the neurosurgeon involved.

19. The decision as to what procedure to follow in the surgery was that of the attending surgeon. The instruments to be used in the procedure was the decision of the neurosurgeon. The decision as to which neurosurgeons would go to the Veterans Administration Medical Center and perform the services was that of the doctors associated with the University of New Mexico.

20. The Chief of Surgery of the Veterans Administration Medical Center, Albuquerque, New Mexico, did not direct or control Dr. Kaplan in performing the surgery on Plaintiff, could not and did not direct Dr. Kaplan as to the surgical methods or the instruments to be used in performing any surgery.

21. Dr. Kaplan, in May 1976, was not eligible for life and health insurance benefits from the Veterans Administration Medical Center, Albuquerque, Nex Mexico, nor did he earn annual or sick leave benefits from the Veterans Administration. He received no F.I.C.A. and no civil service retirement from the Veterans Administration.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over all parties and the subject matter of this action.

2. By oral agreement, the contract between the School of Medcine, University of New Mexico, and the Veterans Ad-

ministration Medical Center which provided for neurosurgical services was in effect on May 20, 1976.

3. This contract intended that the School of Medicine, University of New Mexico, would provide medical services stated therein to the Veterans Administration Medical Center on an independent contractor basis.

4. Apart from the contract, the relationship between the School of Medicine, University of New Mexico, the neurosurgeons from the University of New Mexico and the Veterans Administration Medical Center was such that Dr. Kaplan cannot be considered an employee of a federal agency as required by the Federal Tort Claims Act.

5. On May 20, 1976, Dr. Kaplan was an employee of the School of Medicine, University of New Mexico, which was an independent contractor providing specified medical services to the United States of America.

6. The United States of America is not responsible for any acts or omissions on the part of Dr. Kaplan in May 1976. 28 U.S.C. Section 1346(b); 28 U.S.C. Section 2671.

7. There is no factual basis to equitable estop the United States of America from asserting that Dr. Kaplan was an employee of an independent contractor and not an employee of a federal agency.

8. Plaintiff has no cause of action against the United States of America.

9. The First Amended Petition should be dismissed.

10. Defendant United States of America's Third Part claim against the Regents of the University of New Mexico and Ralph Kaplan is moot and should be dismissed.

All requested Findings of Fact and Conclusions of Law not included herein are hereby denied.

Santiago E. Campos

UNITED STATES DISTRICT JUDGE

APPENDIX D
IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

RAYMOND LURCH,
Plaintiff,

vs.

CIVIL NO. 79-034-C

UNITED STATES OF AMERICA,
Defendant-Third Party Plaintiff,

vs.

THE REGENTS OF THE UNIVERSITY OF NEW MEXICO and RALPH KAPLAN,
Third Party Defendants.

Entered on Docket
20-20-80
FILED
United States District Court
Santa Fe, New Mexico
Oct. 20, 1980
Jesse Casaus, Clerk

JUDGMENT

This action having come before the Court, Honorable Santiago E. Campos, District Judge presiding, the Court having considered the issue of the independent contractor status of the University of New Mexico and Ralph Kaplan upon stipulation of the parties and having entered its Findings of Fact and Conclusions of Law and the issue having been duly tried and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the First Amended Petition shall be, and hereby is dismissed.

IT IS FURTHER ORDERED that Defendant United States of America's Third Party claim against the Regents of the University of New Mexico and Ralph Kaplan is moot and is hereby dismissed.

JESSE CASAUS, CLERK

By /s/ Margaret S. Marquez
Deputy Clerk

Office - Supreme Court, U.S.
FILED
MAR 2 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1134

In the Supreme Court of the United States

OCTOBER TERM, 1983

RAYMOND LURCH, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the court of appeals' decision that the United States is not liable under the Federal Tort Claims Act (FTCA), 28 U.S.C. (& Supp. V) 2671 *et seq.*, because the physician who treated petitioner at a Veterans Administration (VA) hospital was not an "employee" of the federal government.

1. On May 19, 1976, petitioner was admitted to the VA hospital in Albuquerque, New Mexico, for an operation designed to relieve severe pain he was experiencing on the left side of his face (Pet. App. A3 & n.1). Petitioner's physician, Dr. Ralph Kaplan, a specialist in neurosurgery, was a member of the faculty at the University of New Mexico School of Medicine, and, pursuant to a contract between the VA and the University, he regularly provided specialized neurological services for the hospital (*id.* at C2). Dr. Kaplan diagnosed the problem as a damaged trigeminal nerve that had been injured in an earlier accident. He proposed to sever the nerve and thereby cut off the painful

sensations it was delivering to petitioner's face. Unfortunately, the operation was not successful. Not only did petitioner's pain in his face return, but also he lost all hearing in his left ear. *Id.* at A3.

Petitioner filed suit against the United States under the Federal Tort Claims Act, 28 U.S.C. (& Supp. V) 2671 *et seq.*, in the United States District Court for the District of New Mexico, alleging that the VA was responsible for Dr. Kaplan's negligence in treating petitioner's condition. The United States filed a third-party complaint against the Regents of the University and Dr. Kaplan and filed a motion for summary judgment against petitioner, arguing that it was not liable because Dr. Kaplan was not an "employee" of the United States within the meaning of 28 U.S.C. (& Supp. V) 1346(b) and 2671.

The district court granted the government's motion and entered judgment against petitioner (Pet. App. C1-C4).[1] The court found that, under the contract between the University and the VA, the University agreed to provide neurological services by one or more neurosurgeons selected by the School of Medicine; the University also assumed full responsibility to take care of the physicians' worker's compensation, insurance, health benefits and social security payments; Dr. Kaplan was paid solely by the University and received no money from the VA; the VA did not supervise Dr. Kaplan's exercise of medical judgment; and Dr. Kaplan was free to perform any neurologically related surgery using any method or instruments of his choice (*id.* at C2-C3). Based on these findings, the district court concluded that Dr. Kaplan was not an "[e]mployee of the [federal] government" within the meaning of 28 U.S.C. (& Supp. V) 1346(b) and 2671.

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[1]The district court also dismissed as moot the government's third-party complaint against Dr. Kaplan and the Regents of the University (Pet. App. C4).

The court of appeals affirmed (Pet. App. A1-A16). Initially, it expressed some doubt about how the "government control" test for deciding whether a contractor is a federal employee under Section 2671 should be applied when the contractor is providing specialized medical care, which by its nature does not permit supervision. The court found it unnecessary to resolve the problem in this case, however, because "the contractual arrangement itself and its application placed Dr. Kaplan outside the parameters of an employer-employee relationship with the Government" (Pet. App. A8). In this regard, the court noted that the contract expressly stated that the medical personnel supplied to the VA by the University " 'shall not be considered VA employees for any purpose' " (*ibid.* (citation omitted)).[2]

2. Petitioner argues (Pet. 7-9) that the court of appeals erred by relying primarily upon the contract between the VA and the University instead of more mechanically applying a "day-to-day supervision" or "control" test. Petitioner's argument erroneously assumes, however, that the contract is not itself directly relevant to the basic issue of the federal government's control over the contractor. In *Logue* v. *United States*, 412 U.S. 521, 529-530 (1973), this Court relied heavily upon the contract between the Bureau of

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[2]The court of appeals also rejected petitioner's alternative argument that 38 U.S.C. 4116(a), which makes the Federal Tort Claims Act the exclusive remedy for certain medical malpractice suits, creates an exception to the ordinary FTCA rule that the United States is not liable for the negligence of its independent contractors. The court of appeals stated that "we do not read the statute to increase or expand the available remedies against the United States" (Pet. App. A12). Furthermore, the court found that the rest of the provision, which authorizes the Attorney General to defend these suits and which provides for removal to federal court of suits arising out of actions within the scope of the defendant's employment, 38 U.S.C. 4116(b) and (c), strongly indicated that Congress intended 38 U.S.C. 4116(a) to apply "only to federal employees acting within the scope of their employment" (Pet. App. A13).

Prisons and the local county jail in deciding that the United States lacked authority to control the sheriff's employees and therefore that they were not employees of the federal government. Similarly, here, where control over the basic terms and conditions of Dr. Kaplan's employment remained with the University pursuant to its contract with the VA, there is no basis for finding that Dr. Kaplan was an employee of the federal government.

Nor is *United States* v. *Orleans*, 425 U.S. 807 (1976), contrary to the decision below. In that case the Court held that a recipient of an Office of Economic Opportunity (OEO) grant who must comply with federal standards in using the federal money was an independent contractor unless the government supervised the day-to-day operations of the grantee. But in deciding whether there was supervision, the Court only considered how Congress had structured the relationship between the OEO and its grantees and did not discuss any actual proof of supervision. In this case the relationship between the VA and the University was contractually defined. Accordingly, the court below properly focused on the terms of the contract.[3]

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[3]The court of appeals was clearly correct in holding that the VA's "control" over the operation of the hospital, which indirectly affected some aspects of the neurosurgeons' activities at the hospital, was not sufficient to make Dr. Kaplan a federal employee (Pet. App. A9 n.9). See *United States* v. *Orleans*, 425 U.S. at 817-818; *Logue* v. *United States*, 412 U.S. at 529-530.

Petitioner emphasizes (Pet. 8) the court of appeals' comment that the "control" test might require modification in cases involving physicians because otherwise it would be "doubtful whether a physician could ever be found to be a federal employee under the FTCA" (Pet. App. A8 (footnote omitted)). Although not crucial to the proper disposition of this case, the court's comment is inaccurate. The "control" test is only a matter of concern where there is not otherwise a clear employer-employee relationship. The VA directly employs a large number of physicians, and the United States is potentially liable for claims that those physicians acted negligently.

3. Petitioner argues (Pet. 10-11) that 38 U.S.C. 4116(a) constitutes a waiver of the United States' immunity for all claims of negligent medical treatment in VA hospitals. The court of appeals correctly rejected this contention. Section 4116(a) on its face does not create any new governmental liability; instead, it simply insulates physicians and other medical personnel who work at VA hospitals from personal liability *where a remedy against the United States under the FTCA is available*. See *Johnson* v. *United States*, 547 F.2d 688, 693 n.33 (D.C. Cir. 1976). This reading is directly supported by the reference in 38 U.S.C. 4116(a) to the Federal Tort Claims Act provisions, which obviously apply only to federal employees.

Moreover, as the court below correctly determined (Pet. App. A13), the rest of Section 4116 supports the interpretation that it is limited to federal employees. It is most unlikely that Congress meant to authorize the Attorney General to defend suits against non-federal employees or to remove to federal court suits against private individuals based on acts within the scope of their employment. Cf. 28 U.S.C. 2679(b) (analogous provision of Federal Drivers Act); *Tunder* v. *United States*, 522 F.2d 913 (10th Cir. 1975).[4] In short, nothing in 38 U.S.C. 4116(a) indicates that it is a sweeping waiver of sovereign immunity for claims based on injuries caused by independent contractors that provide health care on behalf of the federal government. See *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980) (waivers of sovereign immunity may not be implied but must be unequivocally expressed).

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[4]The legislative history of 38 U.S.C. 4116 demonstrates that the statute was modeled after the Federal Drivers Act, which makes the United States the exclusive defendant in actions arising out of automobile accidents caused by federal employees acting within the scope of their employment. See S. Rep. 861, 89th Cong., 1st Sess. 3 (1965).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MARCH 1984

DOJ-1984-03